

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 373
3079552

BETWEEN	BLACKBURN TRANSPORT LIMITED T/A URBAN CARRIERS (IN LIQ) Applicant
AND	SAMUEL SMITH Respondent

Member of Authority: Marija Urlich

Representatives: S Laphorne and M Chen, counsel for the Applicant,
Paul Chambers, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further information received: 29 July, 26 August and 11 November 2021, 14 and 16
June 2022, 14 October 2022 and 20 June 2024, from the
Applicant
12 August 2021, 16 July 2022 and 14 October 2022,
from the Respondent

Determination: 24 June 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In an earlier determination the Authority found Mr Smith had breached the terms of his employment both during and after his employment with Blackburn Transport Limited (Urban Carriers), now in liquidation and declined his claim for unpaid bonus.¹ The assessment of damages and/or an order to account for profits and

¹ *Blackburn Transport Limited t/a Urban Carriers v Samuel Smith* [2021] NZERA 213.

any penalty award was reserved and is now before the Authority for determination.² Mr Smith's bonus claim was unsuccessful.³

[2] Concerning the claim for damages and/or order to account for profits Urban Carriers has confirmed it seeks an order for damages from the Authority.

The Authority's investigation

[3] By consent Urban Carriers' claim for damages and penalties is determined on the papers. The parties have filed information and submissions in accordance with timetabling directions. To assist with the assessment of damages the Authority has not been provided with expert evidence by for example forensic accountants. It is accepted evidence should be relevant and also proportionate to the claim.

[4] In support of its claim for damages and penalties Urban Carriers has filed:

- (i) affidavit of Tyler Murray, Urban Carrier's bookkeeper;
- (ii) affidavits of Scott Blackburn, Urban Carrier's owner and operator; and
- (iii) submissions.

[5] Mr Smith has filed in reply:

- (i) submissions;
- (ii) affidavits of Emma Churcher and Samuel Smith.

[6] Urban Carriers was placed in liquidation on 15 September 2022. This came to the Authority's attention on 10 October by way of an email from Mr Chambers raising various issues including whether the matter could proceed to determination in the face of the liquidation. By minute dated 12 October the Authority sought the liquidator's view on the matter proceeding. The liquidator wrote to the Authority by letter dated and received on 12 October 2022 which, to avoid any doubt, consented to the proceedings continuing.⁴ The parties were provided an opportunity to provide further comment. At Mr Chambers request a case management conference was convened on 14 October to clarify the effect of the liquidation on these proceedings. The liquidators have very

² Above n1 at [53], [54].

³ Above n1 at [51].

⁴ Companies Act 1993, section 248.

recently confirmed their consent to the penalty application proceeding including they would be in a position to enforce any penalty award.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. The Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three-month timeframe required by s 174C(3) of the Act.

The findings of breach

[8] In the earlier determination the Authority found Mr Smith, while in the employ of Urban Carriers breached express terms of the employment agreement concerning duties, obligations and confidentiality, breached implied obligations of loyalty and fidelity and breached the statutory duty of good faith owed to Urban Carriers by:⁵

- (i) discussing his new business with established customers of Urban Carriers;
- (ii) sowing dissatisfaction with established customers about possible price increases and by failing to deal with and communicate client complaints to Urban Carriers;
- (iii) performing work for established customers of Urban Carriers in competition with Urban Carriers;
- (iv) using Urban Carriers pricing or near identical pricing in performing this competing work;
- (v) performing work for established customers of Urban Carriers when he had told his employer he would not; and
- (vi) failing to return Urban Carriers property on termination of his employment.

[9] With respect to post-employment restraints and breaches of such, the earlier determination found Urban Carriers had a proprietary interest in its trade connections

⁵ Above n1 at [41] – [43] and [50].

with key customers and pricing and sale practices and Mr Smith had used this information after his employment ended in breach of his obligations to Urban Carriers.

Damages

[10] As stated above Urban Carriers seeks an order for damages. It says Mr Smith's breaches are a substantial factor in causing it to lose customers and revenue. Revenue is the money made from running a business before costs are removed. Goods and services tax is not payable on any damages awarded.

[11] In his submission Mr Smith disagrees with the liability finding but submits Urban Carriers would not be entitled to a damages award of more than \$1,086.61 given invoices tendered of \$35,413.75 less tax and GST further off set by his bonus claim of \$9,750 plus interest. Mr Smith submits, correctly, Urban Carriers is not entitled to enrich itself through this claim. The amount of \$35,413.75 appears to be calculated from invoice records for the period April to September 2020. As set out above, the liability finding and bonus have already been determined.

[12] The general principles applicable in an assessment of damages are:

- a. damages are to compensate the injured party for the loss it has sustained;
- b. the injured party is not entitled to a windfall;
- c. the respondent can only be held liable for consequences which can convincingly be said to have been a result of the respondent's conduct; and
- d. the onus is on the applicant to prove loss, and the extent of loss on the balance of probabilities.⁶

[13] The objective of any damages award is to put Urban Carriers, as far as a calculation of money could, in the position it would have been in if Mr Smith had not committed the various breaches of his contractual duties.⁷ A claimant for damages arising from a loss must take all reasonable steps to mitigate the loss and cannot recover losses that can be avoided.⁸ The revenue received from customer sales does not deduct

⁶ *Medic Corporation Ltd v Barrett (No2)* [1992] 3 ERNZ 977 at 983-984.

⁷ *Civil Remedies in New Zealand* (2003) Blanchard & Ors 1.3.1 at 9.

⁸ *Rooney Earthmoving Limited v McTague* [2012] NZEmpC 63 at [113].

any costs or expenses associated with operating the business. Profit is the amount of income that remains after accounting for all expenses, debts, additional income streams and operating costs. The profit and loss statements provided to the Authority show the direct expenses incurred in producing sales was at least 70% of sales achieved.⁹ An appropriate methodology for assessing Urban Carriers damage is the loss of gross margin compromising lost sales, less the direct expenses Urban Carriers would have incurred in producing those sales.¹⁰

Did Urban Carriers suffer a loss caused by Mr Smith's breaches?

[14] The first consideration in an assessment of damages is whether Urban Carriers can establish Mr Smith's breaches were a substantial factor in causing it to lose customers and revenue.¹¹

[15] Mr Blackburn and Mr Murray said in their evidence that Mr Smith's breaches of his terms of employment undermined Urban Carrier's relationship with key, established customers and it has suffered loss as a result. They said his actions caused Urban Carriers to lose customers and revenue because he did work for the established customers that they would likely have contracted with Urban Carriers to perform based on the pattern of work performed over the proceeding years, the work Mr Smith did for them is work Urban Carriers could have performed and they did no or very little work for those customers. This evidence is accepted.

[16] There is no compelling evidence before the Authority to suggest the loss of the customers would have happened anyway or would have occurred if Mr Smith had acted in compliance with the terms of his employment agreement. The evidence of customer dissatisfaction with Urban Carriers is sufficiently linked to Mr Smith's actions in promoting his business to those customers, failing to deal with their complaints in a manner consistent with his obligations to his employer and performing work for established customers of Urban Carriers when he had told his employer he would not to establish a causal link. Urban Carriers has suffered loss caused by Mr Smith's breaches of his employment agreement.

⁹ Urban Carriers profit and loss statements years ending 31 March 2018, 2019, 2020 and 2021.

¹⁰ Above n8, [66].

¹¹ *EIL Brigade Road Limited v Brown* HC Christchurch CIV-2001-409-733, 5 August 2004 at [203]-[204].

Duration of the loss

[17] Urban Carriers says it suffered the following losses consequent to Mr Smith's breaches of the employment agreement from May 2019 to September 2020 when Mr Smith, trading under the name SS Movers, invoiced or received payments from established customers of Urban Carriers totalling \$170,194.25 made up of:

\$44,269.25 (May – August 2019);¹² and
\$125,925 (September 2019 – August 2020)¹³

(i) *Losses during Mr Smith's employment May – August 2019*

[18] With respect to the period May – August 2019 the submission is accepted that but for the breaches by Mr Smith this is business Urban Carriers would have likely received. The evidence before the Authority establishes that it is more likely than not that Mr Smith carried out work for the established businesses totalling \$44,269.25 in this period while he was employed by Urban Carriers in breach of obligations owed under his employment agreement including the obligation of fidelity. The evidence also establishes a concomitant drop off in work for Urban Carriers from those customers. The Authority's earlier factual findings of Mr Smith's actions which have given rise to the findings of breach are referred.¹⁴ Also referred to are the findings in the earlier determination of Urban Carriers reasonable attempts to reach a compromise with Mr Smith during his employment to balance his interests and its and Mr Smith's breach of that compromise – these steps can reasonably be seen as taken to mitigate loss.

[19] Urban Carriers is entitled to recover from Mr Smith \$44,269.25 less operating costs which are set at 70%.

(ii) *Losses after Mr Smith's employment ended September 2019 – August 2020
- springboard*

[20] The claimed amount of \$125,925 is quantified from sums invoiced to Urban Carriers' customers or payments received by Mr Smith in this period. Urban Carriers

¹² Key customer #1 \$11,454, key customer #2 \$17,255.75, key customer #3 \$6,549.25, key customer #4 \$6,520.50 and key customer #5 \$2,489.75.

¹³ Key customer #1 \$25,850, key customer #2 \$87,830, key customer #3 \$9,975 and key customer #4 \$2,270.

¹⁴Above n1 at [40] – [43].

submits the duration of loss extends reasonably to 12 months after Mr Smith's employment ended because the 12-month period of non-solicitation restraints in the parties' employment agreement is enforceable, Mr Smith breached those restraints by failing to comply with them because he worked for and/or solicited Urban Carriers customers as identified within the 12 month period after his employment ended and it follows this is a reasonable period over which to assess the duration of Urban Carriers loss.¹⁵ It also says it reasonably would have taken Mr Smith at least this long to establish his business but for the springboard he achieved through breaches of the employment agreement. Further Urban Carriers submits the damage inflicted on its business by Mr Smith's breaches of his employment obligation have cost it at least 12 months damage.

[21] The evidence of Urban Carriers' attempts to mitigate the loss is compelling – it altered its pricing structure, did not replace Mr Smith, reorganised resources to cover his role, reduced the geographical scope of its work and made contact with the key customers.

[22] Mr Smith's breaches during his employment provided him with a springboard to compete with Urban Carriers when his employment ended. The effect of this springboard means the loss suffered by Urban Carriers continued after Mr Smith's employment ended while he continued to perform work for his former employer's customers. However, this advantage cannot last forever and the duration will be limited to whatever period the Authority finds is reasonable to deprive Mr Smith of that advantage.¹⁶

[23] The evidence establishes Urban Carriers is not a large business. The evidence establishes Mr Smith's exploited the advantage he had in his close knowledge of the business and its staff and managers, customers, including key customers and pricing and sales practises helped him to establish and grow his competing business. Given these factors the 12-month duration of loss after Mr Smith's employment ended is reasonable.

[24] Urban Carriers is entitled to recover from Mr Smith \$125,925 less operating costs which are set at 70%.

¹⁵ Clause 24 Mr Smith's individual employment agreement.

¹⁶ Above n8 at [78].

(iii) *Losses beyond August 2020*

[25] This claim is declined. The impact of the Covid period balanced with the period of time Urban Carriers had to reorientate its business to the market weighs against it being able to establish loss from Mr Smith's actions beyond August 2020.

(iv) *Interest*

[26] Under clause 11 of the Second Schedule of the Act Mr Smith must pay Urban Carriers interest using the civil debt interest calculator on the total amount now due in damages from the date of determination until payment is due.¹⁷

Is the restraint of trade enforceable?

[27] Mr Smith received a pay increase and promotion to operations manager when he entered the new employment agreement containing the post-employment restraint Urban Carriers now seeks to enforce. He signed the employment agreement and initialled each page. The employment agreement records he was advised of his right to seek independent advice which he has affirmed by signature.

[28] The Authority has found information about Urban Carriers' customers and its pricing system is confidential. Urban Carriers was entitled to protect that confidential information after Mr Smith's employment ended if it gave him an undue advantage in competition with it.¹⁸

[29] Urban Carriers submits the 12-month restraint was proportionate to prevent Mr Smith using his knowledge of its business, in particular commercially sensitive rates and its customers, to unfairly solicit work from Urban Carriers' customers.

[30] Restraints of trade are prima facie unenforceable and invalid. Urban Carriers must establish the restraint is enforceable and reasonable at the time the agreement was entered into, in the interests of the parties and the public interest.¹⁹ Mr Smith has advanced an argument that the restraint fails for want of consideration. This argument

¹⁷ www.justice.govt.nz/fines/civil-debt-interest-calculator.

¹⁸ *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252 at [46].

¹⁹ *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97 [37] – [41].

is no accepted – when Mr Smith accepted a promotion with Urban Carriers, he entered a new employment agreement with restraints and a pay increase.

Is the period of restraint reasonable?

[31] The restraints are for a period of 12 months after employment ends. Such lengthy restraints are not reasonable for an employee such as Mr Smith. While it is accepted Mr Smith was a trusted employee with access to information which was confidential and in which Urban Carriers had a proprietary interest the evidence as to why the length of restraint was necessary given these circumstances was not strong. The period of the restraint was not reasonable and is unenforceable.

Penalties

[32] Urban Carriers seeks penalties against Mr Smith. It submits an award of penalties is warranted against Mr Smith for breaches of his employment obligations, breach of good faith and delaying and obstructing the Authority's investigation under s 134A of the Act.

Breach of employment obligations

[33] In the earlier determination the Authority found Mr Smith's conduct during and after his employment ended breached the parties' employment agreement.²⁰ Urban Carriers seeks penalties for the following found breaches by Mr Smith:²¹

- breaches of the express terms of his employment agreement;
- breaches of his obligations of confidentiality; and
- breaches of his implied duty of fidelity.

[34] Urban Carriers submits Mr Smith's actions in using confidential information to compete with his employer during his employment and deliberately undermining customers' confidence in Urban Carriers are serious breaches. It further submits that each time Mr Smith used Urban Carriers information to undertake work for Urban Carriers' customers was a breach of his confidentiality obligations and constitutes a

²⁰ Above n 1, at [38] – [48].

²¹ The restraint of trade has been found unenforceable so that penalty claim cannot proceed.

separate breach. The submission is accepted that the breaches are interrelated and should be globalised. Urban Carriers says given Mr Smith's multiple breaches of his employment agreement and the maximum penalty against a person is \$10,000 the starting point for the Authority's consideration of penalty should be \$9,000.

Breach of good faith

[36] The objects of the Act include building productive employment relationships through the promotion of good faith. Mr Smith's actions have been found to amount to a breach of those obligations.²² The breaches arose from Mr Smith's knowing statements to Urban Carriers that he was not competing when he was. Given the many months over which Mr Smith was undertaking work for Urban Carriers' key clients the breaches, as found, must be seen as deliberate, serious and sustained.

[37] The objects of the Act include building productive employment relationships through the promotion of good faith. Mr Smith's actions have been found to amount to a breach of those obligations. The breaches were serious, deliberate, sustained and prolonged over the four-month period before his employment ended. The submission is accepted that this action has undermined the employment relationship.

Obstructing and delaying the Authority investigation

[38] Section 134A of the Act provides a penalty may be imposed for obstructing and delaying the Authority investigation. Paragraph [7] of the earlier determination details the actions by Mr Smith and those taken on his behalf which have delayed and/or obstructed the Authority's investigation. While ill health caused part of the delay, this did not explain Ms Smith's ongoing failure to comply with Authority directions over the extended period of time as narrated in the earlier determination. That failure has delayed and obstructed the investigation.

Penalties - analysis

[39] There are three penalties including a globalised penalty. The starting point is \$30,000. In considering whether a penalty is warranted and, if so, at what level, I have had regard to the factors set out in s 133A of the Act, as well as the Employment Court

²² Above n 1, [43].

decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd* and determinations of the Authority which deal with similar matters.²³

The nature and extent of the breaches

[40] The nature of the breaches is significant - Mr Smith set up a competing business whilst employed by Urban Carriers, used confidential, proprietary information gained during his employment to establish that business in the face of an express statement to Urban Express that this was not the case. The breaches were blatant.

The nature and extent of any loss or damage suffered

[41] There was significant evidence of direct loss of business suffered by Urban Carriers resulting from Mr Smith's breaches. In addition, there has been the significant amount of time and resources it has expended in protecting its rights as well as the legal cost all of which may not be recoverable through this claim.

Intentional, inadvertent or negligent

[42] Ms Smith's breaches must be seen as intentional in the face of Urban Carriers reminder of his obligations during and after employment and his repeated assurances that he would not compete with it and would abide with his obligations including after his employment ended. A further relevant factor is Mr Smith continued to use Urban Carrier's confidential information after his employment ended and did not compromise or seek to assess the enforceability of his post employment obligations through an application to the Authority.

Steps have been taken in mitigation

[43] Mr Smith does not appear to have taken any steps in mitigation. He has denied any breach, refused to sign undertakings, did not propose undertakings and has been found to have obstructed and delayed the Authority investigation.

²³ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

The circumstances of the breach and any vulnerability

[44] There is no relevant previous conduct of Ms Smith's before the Authority to consider. There is not information before the Authority that the payment of a penalty is likely to create a financial strain for Mr Smith.

[45] Standing back, looking at all the circumstances of this matter and, in comparison to other cases I conclude that a fair penalty is \$20,000. Mr Smith is ordered to pay the penalty to Urban Carriers towards the inconvenience and resources expended in pursuing this matter.

Outcome

[46] Samuel Smith must pay Blackburn Transport Limited (in liq) \$170,194.25 less operating costs set at 70% within 28 days of the date of determination.

[47] Samuel Smith must pay Urban Carriers interest using the civil debt interest calculator on the total amount now due in damages from the date of determination until payment is due.

[48] Samuel Smith must pay a penalty of \$20,000.00 for his breaches of employment obligations, good faith and for obstructing and delaying the Authority investigation within 28 days of the date of this determination. All this sum is to be paid to Blackburn Transport Limited (in liq).

Costs

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[50] If parties are unable to resolve costs between them and an Authority determination on costs is needed Urban Carriers may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Smith would then have 14 days to lodge any reply memorandum.

[51] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[52] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²⁴

Marija Urlich
Member of the Employment Relations Authority

²⁴ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.